Anwar et al v. Fairfield Greenwich Limited et al Doc. 232

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

MASTER FILE NO. 09-CV-0118 (VM)

This Document Relates To:

09-CV-2366 (VM) (*Ferber* Action)
09-CV-2588 (VM) (*Pierce* Action)
09-CV-5012 (VM) (*Morning Mist* Action)

DEFENDANT FGA'S SUR-REPLY IN FURTHER OPPOSITION TO DERIVATIVE PLAINTIFFS' MOTIONS TO REMAND

September 8, 2009

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PRELIMINARY STATEMENT

Defendant FGA files this sur-reply in further opposition to Derivative Plaintiffs' motions to remand principally to address a number of alleged factual issues raised by Derivative Plaintiffs.

First, contrary to Derivative Plaintiffs' suggestion, the number of current beneficial holders in Greenwich Sentry Partners ("GSP") remains over 100. As reflected in the Further Supplemental Declaration of Paul J. Sirkis filed herewith, the two investors whose subpoena responses did not clearly indicate the status of their beneficial holders have confirmed that all but two of them are *current investors*. Consequently, GSP has at least 109 current beneficial holders, exceeding the 100-person requirement under CAFA. Derivative Plaintiffs' contention that counting beneficial holders under CAFA would "destroy state court jurisdiction over virtually every mid-sized or large case filed by a public company" (Derivative Plaintiffs' Reply In Further Support Of Their Motions To Remand ("Reply") at 1) is without merit. CAFA clearly states that its mass action requirements are satisfied if the "monetary relief claims of 100 or more persons are proposed to be tried jointly." Here, Derivative Plaintiffs propose to try jointly the monetary relief claims of more than 100 investors in *private investment funds*, clearly satisfying the language of the statute. There is no reason why the result here would or should apply to corporate shareholders.

Second, Derivative Plaintiffs' argument that the number of current beneficial holders may not reach 100 because "many subscription agreements" require the general partner's consent to the creation of a beneficial interest is both irrelevant and based on a mischaracterization of the GSP subscription agreements.

Third, Derivative Plaintiffs still cannot establish that any CAFA exception, including the internal affairs exception, applies.[1]

Finally, Derivative Plaintiffs' argument that a claim for monetary relief is precluded by the derivative nature of their suits is contrary to settled law, including the very case they cite in support of their erroneous argument.

ARGUMENT

I. THE COURT-ORDERED DISCOVERY ESTABLISHES THAT THERE ARE OVER 100 CURRENT BENEFICIAL CLAIM HOLDERS IN *PIERCE*

Derivative Plaintiffs question whether the beneficial claim holders listed in the responses to FGA's subpoenas by Accucom Profit Sharing Plan ("Accucom") and Triumph Multi-Series Fund LP ("Triumph") are current. Reply at 6-7. As indicated in Exhibits 1 and 2 of the Further Supplemental Sirkis Declaration dated September 8, 2009, all of Triumph's beneficial holders and ten of Accucom's twelve beneficial holders are current. Taking this into account, FGA amends its count of current GSP beneficial holders from 111 to 109, which still exceeds the 100-person requirement under CAFA.

In an attempt to prevent the proper application of CAFA, Derivative Plaintiffs claim that the "real party in interest" in a derivative suit is the named plaintiff,[2] Reply at 2-3, and that Congressional intent is clear on this point because Congress "could have changed that rule for CAFA" but failed to do so. *Id.* Again, this misses the point. The question is not how many

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1 FGA does not "deny its burden of proof" as Derivative Plaintiffs argue. Reply at 1-2. FGA acknowledges that the burden to establish threshold CAFA requirements are on the removing party. However, the burden to prove *exceptions* falls on Plaintiffs.

2 In an attempt to further differentiate class and derivative claims, Derivative Plaintiffs erroneously argue that courts prohibit class counsel from asserting derivative claims. To the contrary, courts have permitted such representation. *See, e.g.*, *Berman v. HNC Mortgage & Realty Investors*, 27 Fed. R. Serv. 2d 370 (D. Conn. 1979).

"real parties in interest" exist in a derivative case,[3] but whether there are "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly." 28 U.S.C. § 1332(d). Here, FGA has demonstrated that there are.

The recent case of *State of Oregon v. Oppenheimerfunds, Inc.*, No. 09-CV-6135, 2009 WL 2517086 (D. Or. Aug. 14, 2009), further supports FGA's position. Defendants in *Oppenheimerfunds* argued that removal under SLUSA was appropriate as a covered "class action" because it involved damages sought on behalf of thousands of trust beneficiaries. The court examined whether damages were in fact "sought on behalf of more than 50 persons or prospective class members" as required for SLUSA removal. The court noted that: "At first blush, the answer to the questions appears simple – the Oregon 529 College Savings Board seeks damages on behalf of the thousands of OCS plan participants alleging misrepresentations and omission of a material fact in connection with the purchase or sale of the Core Bond Fund..." However, only because SLUSA explicitly states that "a corporation, investment company, pension plan, partnership, or other entity, *shall be treated as one person or prospective class member*, but only if the entity is not established for the purpose of participating in the action," 15 U.S.C. § 78bb(f)(5)(D) (emphasis added), the court found that the Oregon 529 College Savings Board should be considered a single plaintiff. In stark contrast with SLUSA, CAFA does not have a similar counting provision. The fact that such a counting provision explicitly exists in SLUSA, coupled with no such provision in CAFA, a statute covering similar subject matter and passed in a similar time period, indicates that Congress did *not* intend for claimants to be counted the same way under CAFA as they are under SLUSA.

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[3] The case law is also clear that limited partners have a significant stake in derivative litigation. *See, e.g., Indep. Investor Protective League et al. v. Time, Inc.*, 50 N.Y.2d 259, 263 (1980) ("Although in a theoretical sense a derivative action is brought for the benefit of the corporation, '[i]n a very real sense...the standing of the shareholder is based on the fact that...he is defending his own interests as well as those of the corporation.'"); *Tenney v. Rosenthal*, 6 N.Y.2d 204, 211 (1959) (same); *Sorin v. Shahmoon Indus., Inc.*, 220 N.Y.S.2d 760 (1961) (same).

Derivative Plaintiffs also argue that the exhibits to the Amended Sirkis Declaration ("Am. Sirkis Decl.") include "letters and emails" that are inadmissible hearsay.[4] Reply at 6. Derivative Plaintiffs are wrong. The so-called "letters and emails" are responses to subpoenas, and as such are admissible under Federal Rule of Evidence 807. *See U.S. v. Am. Cyanamid Co.*, 427 F. Supp. 859 (S.D.N.Y. 1977); *U.S. v. Gwathney*, 465 F.3d 1133, 1141-42 (10th Cir. 2006). *See also U.S. v. Simmons*, 773 F.2d 1455, 1459 (4th Cir. 1985); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993); *Furtado v. Bishop*, 604 F.2d 80, 91–93 (1st Cir. 1979); *U.S. v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976); *U.S. v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993).[5]

II. DERIVATIVE PLAINTIFFS MISCHARACTERIZE THE GSP SUBSCRIPTION AGREEMENTS

[redacted]

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4 Notably, Derivative Plaintiffs do not challenge the authenticity of the documents attached to the Declaration nor the reliability of the information contained therein.

5 Moreover, the Amended Sirkis Declaration also is "a vehicle placing before the Court relevant, admissible documents" and "the Court can "draw its own conclusions based on th[e] evidence, not based upon an attorney's characterizations of it." *New York v. Solvent Chemical Co., Inc.*, 218 F. Supp. 2d 319, 331 (W.D.N.Y. 2002); *Gasser v. Infanti Int'l, Inc.*, No. 03 Civ. 6413, 2008 WL 2876531, at *7 (E.D.N.Y. July 23, 2008).

[redacted]

III. THE INTERNAL AFFAIRS DOCTRINE IS A CAFA EXCEPTION AND DERIVATIVE PLAINTIFFS CANNOT ESTABLISH THAT IT APPLIES HERE

Derivative Plaintiffs confusingly cite a number of inapposite cases to support their argument that the internal affairs doctrine is somehow not an exception to CAFA and that therefore Defendants bear the burden of proof. Reply at 8, fn. 14. Their argument runs counter to controlling authority, which clearly holds that the internal affairs doctrine *is* an exception to CAFA jurisdiction, and that the burden of proof is therefore on the plaintiff. *See, e.g., Puglisi v.*

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6 [redacted]

Citigroup Alternative Invs. LLC, No. 08 CV 09774, 2009 WL 1515071, at *1 (S.D.N.Y. May 29, 2009) ("[T]he burden is on plaintiff to establish that one of the aforementioned exceptions to CAFA [including the internal affairs exception] is applicable."); *In re Textainer P'ship Sec. Litig.*, No. C 05-0969 MMC, 2005 WL 1791559, at *4 (N.D. Cal. 2005) ("[P]laintiff bears the burden of demonstrating that the [internal affairs exception] appl[ies].")

A substantial portion – in each case over 14 pages – of Derivative Plaintiffs' claims concern Pricewaterhouse Coopers' ("PwC") role as auditor to the fund. *Ferber* Compl. at 35-49; *Pierce* Compl. at 35-49; *Morning Mist* Compl. at 49-69. PwC's role clearly falls outside of the "internal affairs doctrine" because PwC is not a limited partner, general manager, manager, or investment manager in the fund. Since the derivative complaints involve both Fairfield Defendants *and* PwC, the internal affairs exception cannot apply to those cases because the claims against PwC do not relate to internal affairs. For example, the court in *In re Am. Int'l Group, Inc.*, 965 A.2d 763 (Del. Ch. 2009), held that:

> In a rather weak attempt to avoid New York law, the Stockholder Plaintiffs assert that PwC's liability relates to the internal affairs of a Delaware corporation and thus is governed by our law under the internal affairs doctrine... Although PwC's role as an auditor relates to the internal affairs of the corporation, PwC was still a contractual agent employed by AIG to carry out certain contractual duties rather than a part of AIG... Because PwC only faces claims for malpractice and breach of contract, rather than claims that it consciously aided wrongful managerial misconduct, I apply New York law to the claims against it.

Id. at 817-822.

Derivative Plaintiffs also attempt to distinguish *Puglisi v. Citigroup Alternative Invs. LLC,* No. 08 CV 09774, 2009 WL 1515071, at *3 (S.D.N.Y. May 29, 2009) (holding that cases relating to the improper promotion and marketing of securities are not solely related to a fund's internal affairs) on the basis that the derivative complaints here purportedly do not contain allegations of "improper marketing and promotion." To the contrary, the derivative complaints here are replete with allegations relating to improper marketing. These include, *inter alia*:

- "FGG, and its other related entities, marketed the Fund to investors and purported to conduct due diligence on behalf of the Fund. FGG posted on its website a letter dated January 8, 2009 to its investors, stating that as of November 1, 2008, FGG had total assets under management of approximately $14.1 billion, of which approximately $6.9 billion was invested in vehicles connected to BMIS. Plaintiffs believe that nearly all of Greenwich Sentry Partners' assets invested with BMIS have been lost." *Pierce* Compl. at ¶ 5.

- "In documents issued in connection with its funds, FGG represented that it conducted 'deeper and broader' due diligence and performed continued risk monitoring of its fund managers, which include Madoff and BMIS. This was untrue." *Pierce* Compl. at ¶ 6.

- "While touting their 'higher level' of due diligence over their competitors, the Fund Defendants, in fact, allowed Madoff and BMIS to go unchecked, while issuing false reports to investors presenting nonexistent, or, at the very least, highly inflated, profits, and collecting fees based on such fictitious profits." *Pierce* Compl. at ¶ 7.

- "According to FGG's website and a marketing brochure provided to potential investors and also available on its website, FGG's 'deeper and broader' due diligence included . . . The FGG brochure goes on to say that 'the purpose of this ongoing activity is to ensure that the fund continues to follow its investment methodology – and constraints – and otherwise acts in accordance with the operational and risk framework that was approved during the due diligence phase.'" *Pierce* Compl. at ¶ 38.

- "FGG's website and marketing brochure explain that 'Operational failures, including misrepresentation of valuations and outright fraud, constitute the vast majority of instances where massive investor losses occur.' Operational risk, according to FGG, 'refers to the risk of loss resulting from inadequate or failed internal processes, human resources, or systems or from external events.'" *Pierce* Compl. at ¶ 56.

- "FGG violated its duties of candor and loyalty to the Fund and Limited Partners by falsely representing that it performed a 'higher level' of 'deeper and broader' pre-investment due diligence and post-investment multifaceted risk monitoring of its managers than its competitors." *Pierce* Compl. at ¶ 98.

IV. DERIVATIVE PLAINTIFFS SEEK MONETARY RELIEF

Citing *Ross v. Bernhard*, 396 U.S. 531 (1970), Derivative Plaintiffs argue that because they are suing *derivatively*, they cannot be seeking "monetary relief." Reply at 7. But *Ross* actually contradicts their argument. In fact, the *Ross* court determined that the relief sought in connection with the derivative claim was indeed, at least in part, for money damages. *Id.* at 543 ("In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages."). There can be no doubt that a shareholder in a derivative proceeding may seek and obtain monetary damages. *See, e.g., Liman v. Midland Bank Ltd.*, 309 F. Supp. 163 (S.D.N.Y. 1970); *Norte & Co. v. Huffines*, 288 F. Supp. 855 (S.D.N.Y. 1968), *aff'd in part rev'd in part,* 416 F.2d 1189 (2d Cir. 1969). Derivative Plaintiffs' claim to the contrary is simply wrong.

CONCLUSION

For the foregoing reasons, Moving Plaintiffs' request to remand *Ferber*, *Pierce*, and *Morning Mist* to State court should be denied.

Dated: September 8, 2009
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